A

RHB BANK BHD

v.

TOKODAYA SDN BHD & ANOR

B HIGH COURT SABAH & SARAWAK, KOTA KINABALU
SULONG MATJERAIE J
[CIVIL SUIT NO: K22-92-2000]
5 APRIL 2007

C ***CIVIL PROCEDURE:*** *Summary judgment - Appeal for - Plaintiff filed for summons for directions under O. 25 Rules of the High Court 1980 - Preliminary objection raised - Proceeding with summons for directions and receiving directions for trial - Whether plaintiff estopped by conduct to ask for summary judgment - Whether objection raised on a*
D *substantive issue - Whether plaintiff had taken irreversible step to proceed with trial - Whether case should proceed for trial*

CIVIL PROCEDURE: *Preliminary objection - Procedural and technical objection - Plaintiff filed for summons for directions under O. 25 Rules of*
E *the High Court 1980 - Receiving directions for trial - Whether too late to consider plaintiff's application for summary judgment - Whether plaintiff estopped by conduct to ask for summary judgment - Whether objection raised on a substantive issue - Whether plaintiff had taken irreversible step to proceed with trial - Whether case should proceed for*
F *trial*

The plaintiff's claim against the defendant was for a sum of RM2,676,900.35 for banking facilities granted comprising of overdraft, term loan and bridging loan facilities. At the close of the pleadings, the plaintiff applied for summary judgment pursuant to
G O. 14 of the Rules of the High Court 1980 ('RHC') as well as under O. 92 r. 4 RHC. The deputy registrar found that there were triable issues and dismissed the application. The plaintiff filed a notice of appeal under O. 56 r. 1 RHC. A summons for direction under O. 25 RHC was also filed by the plaintiff.
H Subsequently, an affidavit was filed by the plaintiff to further amend the writ and statement of claim under certain items of the summons for direction and leave to amend was granted. The court further ordered the parties to serve a list of documents and ordered inspection and discoveries of documents. The defendant
I raise a preliminary objection where he argued that once the plaintiff had taken out the summons for directions under O. 25 RHC and

an order for direction was made, it would be too late to consider the application for summary judgment. It was argued that having taken the summons for directions, the plaintiff had conceded that the case should go for trial and therefore the summary judgment application should no longer be an issue before the court. The plaintiff argued, *inter alia*, that although the plaintiff had applied for judgment under O. 14 RHC, no directions were given by the court and that the plaintiff did not at any time inform the court that it was abandoning the appeal neither did the defendants object to the taking of the summons for directions. It was argued that there were no provisions of law that render the plaintiff's appeal 'not competent' because the plaintiff had taken out a summons for directions. It had not prejudiced or caused substantial miscarriage of justice for the defendants.

Held:

(1) Order 25 RHC is designed to facilitate the pre-trial process with the direction of the court after the close of pleadings. At this stage of the proceeding, there would be a thorough stocktaking relating to the issues with a view to the expeditious disposal of the action. Thus by taking out the summons for directions, the plaintiff had conceded that this case should go for trial. The fact that orders and directions had been made by this court supported the contention that there were issues to be tried. By opting to proceed with the summons for directions and having received directions for trial from this court, the plaintiff was estopped by conduct to ask for summary judgment. Once the direction had been given under the summons for directions, it had to be presumed that whatever issues to be resolved would have to be resolved at the actual trial. The plaintiff could not now make a case that there were no triable issues (*Ting Hua Yew v Ace Commercial Enterprise Sdn Bhd)*. (paras 12, 15, 16 & 17)

(2) Under O. 25 r. 1(2) RHC, the plaintiff need not take out the summons for directions as this was a case where they have applied for judgment under O. 14 RHC. Yet the plaintiff went ahead and having done that the plaintiff must stand by the option that they have taken and this case must go for trial pursuant to the directions given. There was no evidence that there was any application to vary the direction handed down. (para 18)

(3) It was not for the defendant to object to the summons for directions being taken out as it had always been the contention of the defendants that this action should go for full trial. This was reflected from the fact that the defendants had contested and challenged the plaintiff's application for O. 14 summary judgment. (para 19)

(4) The objection raised by the defendant was based on a substantive issue. It was based on the argument that the plaintiff had chosen to pray for direction for trial. The plaintiff chose to seek direction for trial and therefore the matter should go for trial. The plaintiff had taken an irreversible step to proceed with the trial after having taken out the summons for directions and after directions have been given by the court. Hence, this court directed that the case shall proceed for trial. (paras 20 & 21)

[Order accordingly.]

Case(s) referred to:

Beauford Baru Sdn Bhd v. Gopala Krishnan VK Gopalan [2002] 3 CLJ 686 HC ***(refd)***

Ting Hua Yew v. Ace Commercial Enterprise Sdn Bhd [1996] 2 MLJ 678 ***(foll)***

United Malayan Banking Corporation Berhad v. Ernest Cheong Yang Yin [2001] 2 CLJ 31 CA ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 14, O. 18 r. 19, O. 25 r. 1(2)(a), O. 56 r. 1, O. 92 r. 4

Other source(s) referred to:

Atkin's Encyclopaedia of Court Forms in Civil Proceedings, 1984, 2nd edn, vol 1, pp 90-92

For the plaintiff - Connie Willie; M/s Lind Willie Wong & Chin
For the respondent - Datuk Lawrence Thien Shin Hing; M/s Chau & Thien

Reported by Suhainah Wahiduddin

JUDGMENT

Sulong Matjeraie J:

Brief Facts

[1] The plaintiff's claim against the defendant is for a sum of RM2,676,900.35 for banking facilities granted comprising of Overdraft, Term Loan and Bridging Loan facilities.

[2] At the close of pleadings, the plaintiff applied for summary judgment pursuant to O. 14 of the Rules of High Court 1980 ("RHC") as well as under O. 92 r. 4 RHC. The summary application was heard by learned Deputy Registrar who found that there are triable issues and dismissed the application on 4 July 2003.

[3] On 8 July 2003, the plaintiff filed a notice of appeal to judge in chambers under O. 56 r. 1 RHC. This appeal was fixed for hearing on 12 October 2004. However it was later rescheduled.

[4] In the meantime, the parties applied for amendment to the writ followed by an amendment to the reply.

[5] A summons for direction under O. 25 RHC dated 2 October 2003 was filed by the plaintiff on even date and was fixed for hearing before the Deputy Registrar on 13 October 2003. The hearing was later rescheduled to 6 November 2003.

[6] On 3 November 2003, an affidavit was filed by the plaintiff pursuant to O. 25 RHC to further amend the writ and the statement of claim under items 5 and 6 of the summons for direction by amending the name of the plaintiffs from Bank Utama (Malaysia) Berhad to RHB Bank Berhad. Leave to amend was granted on 6 November 2003 and this court further ordered the parties to serve a list of documents and to file affidavit verifying list and other matters found at encl. 101. Further inspection and discoveries of documents was ordered. This court also ordered that five days be set aside for the hearing and disposal of this case with the plaintiff calling 5 witnesses and the defendants will call 4 witnesses.

[7] For various reasons, the hearing of this appeal at encl. 92 was only scheduled to be heard on 7 February 2007.

[8] Come 7 February 2007, learned counsel for the defendant raised preliminary objection where he argued that once the plaintiff had taken out the summons for directions under O. 25 RHC and an order for direction made, it would be too late to consider the application for summary judgment. It was argued that having taken the summons for directions, the plaintiff has conceded that the case should go for trial and therefore the summary judgment application should no longer be an issue before the court.

[9] Learned counsel for the plaintiff made her submission at encl. 118 arguing, *inter alia*, that although the plaintiff had applied for judgment under O. 14 RHC, no directions were given by the court and that the plaintiff did not at any time inform the court that it was abandoning the appeal neither did the defendants object to the taking of the summons for directions. It was argued that there are no provisions of law that render the plaintiff's appeal 'not competent' because the plaintiff had taken out a summons for directions. It has not prejudiced or caused substantial miscarriage of justice to the defendants.

[10] Lastly it was argued that the practice of raising preliminary objections on technical grounds or non compliance of procedural provision is a thing of the past and as "... we move towards the era of facilitating the process of litigation, the raising of preliminary objection on technical grounds would clearly be a thing of the past" succinctly put by Low Hop Bing J (as he then was) in *Beauford Baru Sdn. Bhd. v. Gopala Krishnan VK Gopalan* [2002] 3 CLJ 686. Another case cited was the Court of Appeal decision in *United Malayan Banking Corporation Berhad v. Ernest Cheong Yang Yin* [2001] 2 CLJ 31 where it is stated that "preliminary objection on a mere technicality should not be allowed to obstruct the process of giving justice to the deserving," per Ahmad Fairuz CJA (now CJ).

[11] Order 25 RHC provides:

Rule 1(1) "With a view to providing, in every action to which this rule applies, an occasion for the consideration by the court of the preparations for the trial of the action, so that:

(a) all matters which must or can be dealt with on interlocutory applications have not already been dealt with may so far as possible be dealt with; and

(b) such directions may be given as to the future course of the action as appear best adapted to secure the just, expeditious and economical disposal thereof,

the plaintiff must, within one month after the pleadings in the action are deemed to be closed, take out a summons in Form 46 (in these rules referred to as a summons for directions) returnable in not less than 14 days."

Rule 1(2) "This rule applies to all actions begun by writ except: A

(a) actions in which the plaintiff or defendant has applied for judgment under O. 14, or in which the plaintiff has applied for judgment under O. 81, and directions have been given under the relevant order; B

(b) action in which the plaintiff or defendant has applied under O. 18 r. 22, for trial without pleadings or further pleadings and directions have been given under that rule;

(c) ...; C

(d) ...;

(e) ...;

(f) ...; and D

(g) ...."

[12] Essentially O. 25 RHC is designed to facilitate the pre-trial process with the direction of the court after the close of pleadings. E At this stage of the proceeding, there would be a thorough stocktaking relating to the issues with a view to the expeditious disposal of the action.

[13] The hearing of O. 25 RHC provides an occasion for the consideration of the court of the preparations for the trial, on F which all matters which must or can be dealt with on interlocutory applications, yet have not already been dealt with, may so far as possible be dealt with, and to give direction as to the future course of the action with a view to its just, expeditious and economic disposal, see *Atkin's Encyclopaedia of Court Forms in Civil* G *Proceedings*, 2nd edn, vol. 1 (1984 Issue) at pp 90-92.

[14] According to Jeffrey Pinsler in his book Civil Practice in Singapore and Malaysia (Cap. XXV) the summons for directions procedure signifies a new phase in the proceedings. It is the stage H when the court and the parties review the case as a whole to determine what further steps are necessary for the matter to be ready for trial. The process is said to provide "... a thorough stock taking in relation to the issues in the action and the manner in which the evidence should be presented at a trial with a view to I shortening the length of the trial and saving costs generally. It

occurs, appropriately, after the pleadings are closed, and, ideally, after discovery has taken place. This is important because the court can only be in an effective position to make orders and give directions as to the future conduct of the case if the issues in dispute, revealed by the pleadings and the documents, are clear.

[15] Thus by taking out the summons for directions, the plaintiff has conceded that this case should go for trial. The fact that orders and directions had been made by this court on the number of witnesses to appear and the number of days allocated to conduct the trial supports the contention that there are issues to be tried. If, on the other hand there is no triable issue, this case should not go for trial. Hence there is no necessity for the filing of the summons for directions.

[16] By opting to proceed with the summons for directions and having received directions for trial from this court, the plaintiff is estopped by conduct to ask for summary judgment. In *Ting Hua Yew v. Ace Commercial Enterprise Sdn. Bhd.* [1996] 2 MLJ 678, the plaintiff took out summons for directions on 26 June 1993 and order for direction was granted on 30 October 1993. Almost a year later, on 30 April 1994, the plaintiff filed an application to strike out certain parts of the defence and prayed for judgment on an amount of RM470,750. At the commencement of the striking out application, counsel for the defendant raised preliminary objection alleging the plaintiff had taken steps to notify the setting down of the action for trial prior to the application. Abdul Kadir Sulaiman J (later FCA) held that the purpose of summons for directions is for the consideration by the court of the preparations for the trial of the action so that all interlocutory matters under O. 18 r. 19 of the RHC would be dealt with. It was too late now for the court to consider the plaintiff's application after an order made upon the summons for directions. By the time an order is made, it is to be presumed that whatever issue there is, that issue needs to be resolved at the full trial of the action. With respect, I agree with and adopt the said decision.

[17] Similarly in this instant case, once the direction has been given under the summons for directions, it has to be presumed that whatever issues to be resolved will have to be resolved at the actual trial. The plaintiff cannot now make a case that there being no triable issues.

[18] Further, it must be emphasised here that under O. 25 r. 1(2) RHC, the plaintiff need not take out the summons for directions as this is a case where they have applied for judgment under O. 14 RHC. Order 25 r. 1(2)(a) RHC is one of the exceptions when summons for directions need not be applied for. Yet the plaintiff went ahead and having done that the plaintiff must stand by the option that they have taken and this case must go for trial pursuant to the direction given. There is no evidence that there was any application to vary the direction handed down on 6 November 2003.

[19] It is also the view of this court it is not for the defendant to object to the summons for directions being taken out as it has always been the contention of the defendants that this action should go for tull trial. This is reflected from the fact that the defendants had contested and challenged the plaintiff's application for O. 14 summary judgment.

[20] On the issue raised by the plaintiff that the preliminary objection is on technical ground or non-compliance of procedural provision being a thing of the past, I feel that the objection raised by the defendant is based on a substantive issue. It is based on the argument that the plaintiff had chosen to pray for direction for trial. The plaintiff chose to seek direction for trial and therefore the matter should go for trial.

[21] After having considered the arguments of both counsel and after perusal of the authorities, I feel that the plaintiff has taken an irreversible step to proceed with the trial after having taken out the summons for directions and after directions have been given by the court.

[22] I therefore direct that the case shall proceed for trial.